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No. 85-1129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL E. JOHNSON,
Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae, pursuant to the written consents of the parties.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and

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[1] Their consents have been filed with the Clerk of the Court.

requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. In addition, nearly all of EEAC's members are subject to the affirmative action requirements under Executive Order 11246, 30 Fed. Reg. 12319 (1965), *as amended* by 32 Fed. Reg. 14303 (1967) and 43 Fed. Reg. 46501 (1978). Finally, many of EEAC's members are signatories to collective bargaining agreements, Title VII settlements, conciliation agreements, consent decrees and other voluntary plans or programs which provide varying forms of remedial relief or affirmative action benefiting persons or groups covered by Title VII and other federal and state equal employment statutes, regulations and orders.

Most of EEAC's member representatives are charged with corporate responsibility for compliance with federal, state and local nondiscrimination laws. As equal employment officers, they must attempt to determine not only their companies' nondiscrimination and affirmative action obligations, but also the nature and extent of any remedial relief which may be necessary, as well as the potential liability which these obligations might create to nonminority employees and applicants.

EEAC's members are concerned about the potential impact that a decision in this case could have on the ability of employers to respond practically and responsibly to allegations that minorities or women may be underrepresented in their workforces. Whether or not such underrepresentation is caused by the particular employer's discrimination, it makes employers potential targets of discrimination suits filed by members of protected groups or by federal and state equal employment enforcement agencies. Such suits often are framed broadly, and the scope of the employer's potential liability may be difficult to ascertain prior to class certification hearings, discovery, trial on the merits, or post-trial remedial proceedings. Consequently, employers often face the practical necessity of exploring ways of ensuring that they are meeting their equal employment obligations and of avoiding such suits, either through settlements or consent decrees, or by voluntary affirmative action to eliminate such underrepresentation.

Employers are concerned that a decision in this case could limit unduly their flexibility in avoiding or resolving discrimination claims, particularly in light of the Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). EEAC members would view with great concern any limitation on the ability of employers to adopt voluntary policies, consistent with *Weber*, which are designed to eliminate a workforce underutilization of protected group members. At the same time, it is clear from *Weber* that, absent a finding of discrimination, preferential treatment cannot be required of employers who do not wish voluntarily to adopt such policies. Accordingly, EEAC members have a direct interest in the issue involved in this case, *i.e.*, the extent to which a conspicuous workforce imbalance justifies a sex-based employment preference undertaken pursuant to a voluntary affirmative action plan.

Because of its interest in such issues, EEAC has participated in numerous other cases involving issues relat-

ing to the nature and scope of the equal employment and affirmative action obligations of employers. *E.g., Local Number 93 v. City of Cleveland,* 106 S. Ct. 3063 (1986); *Wygant v. Jackson Bd. of Educ.,* 106 S. Ct. 1842 (1986); *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP,* 461 U.S. 477 (1983); *Minnick v. California Department of Corrections,* 452 U.S. 105 (1981); *Fullilove v. Klutznick,* 448 U.S. 448 (1980); *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979); *County of Los Angeles v. Davis,* 440 U.S. 625 (1979); *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977).

STATEMENT OF THE CASE

This case involves a challenge brought by Paul Johnson under Title VII, 42 U.S.C. § 2000e, *et seq.*, to the selection, pursuant to an affirmative action plan, of a female for a road dispatcher position with the Transportation Agency of Santa Clara County, California (Agency). Johnson alleges that he was denied the promotion on account of his sex, in violation of Title VII.

In 1979, the Agency announced an opening for a road dispatcher, for which Johnson and eight others, including Diane D. Joyce, applied. Both Johnson and Joyce were long-time Agency employees.

Based on an oral examination conducted by a two-member board, Johnson tied for second with a score of 75, while Joyce (the only female applicant) received the third highest score of 72.5. Following a second oral board, Johnson was recommended for the dispatcher position. Joyce, however, was appointed to the position pursuant to an affirmative action plan (AAP) which had been undertaken voluntarily by the Agency. At the time of her appointment, the plan indicated that the agency had no women in 238 skilled-craft positions. Both of the

road dispatchers at the time of Joyce's appointment were men.

The AAP did not set rigid quotas for any job classification. Rather, the AAP established a goal of attaining a work force which included, in all occupations and at all levels, a composition of minorities, women and handicapped persons consistent with their representation in the area labor force. The AAP expressly stated that:

> The "goals" established for each Division should not be construed as "quotas" that must be met. The "goals["] should rather be seen as realistic desired levels of achievement . . . AAP at 21.

The AAP recognized that the mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and that affirmative measures were required to achieve the goals of the plan. The plan identified job classifications, including skilled-craft jobs, where women had not been "traditionally employed" and where a "significant underrepresentation" of women existed. AAP at 12, 13.

The district court held that the failure of the Agency to promote Johnson to the dispatcher position violated Title VII. The court concluded that Johnson was better qualified and that Joyce would not have been promoted but for her sex. Appendix to Petition for Writ of Certiorari at 12a-13a ("Pet. App."). The court rejected the Agency's reliance on the AAP, stating that the Agency had not demonstrated that the plan was temporary and remedial and that the action pursuant to the plan unnecessarily trammelled Johnson's interests. *Id.* at 14a.

The court of appeals, in an opinion reported at 770 F.2d 752 (1984), reversed the lower court decision. The court of appeals concluded that the AAP was consistent with the standards for lawful voluntary affirmative action plans set forth by this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and that the

purposes of the plan mirrored those of Title VII. The court also observed that the plan was sufficiently temporary, because it was not intended to maintain any particular male-female balance but merely was designed to eliminate a manifest imbalance in certain job classifications.

The court stated that in order to demonstrate that its plan is remedial, it is not necessary for an employer to demonstrate its own purposeful discrimination, nor is a judicial finding of discrimination required. Rather "[i]t is sufficient for the employer to show a conspicuous imbalance in its workforce." 770 F.2d at 758. The court concluded that "Joyce's sex was viewed as an additional positive factor in an otherwise qualified candidate," *id.* at 759, and that the Agency's selection of Joyce pursuant to the AAP was a lawful effort to eliminate an entrenched pattern of imbalance in certain positions in the workforce.

SUMMARY OF ARGUMENT

While it is clear that absent a finding of persistent or egregious discrimination, an employer cannot be *required* to undertake race or sex-based employment preferences, it is equally clear that Title VII *permits* employers voluntarily to engage in certain types of affirmative action without violating the Title VII rights of non-minorities or males. A flexible approach to the types of affirmative action that may be undertaken by employers is consistent with previous decisions of the Court, *see United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and with a number of important policies underlying Title VII. Such an approach provides a means for employers to effectuate the purposes of Title VII by enabling them to increase the job opportunities available to minorities and women.

An internal analysis of an employer's workforce that reveals a conspicuous imbalance of minorities or women provides a sufficient basis for adopting a voluntary af-

firmative action plan or program. This is so, even if such a conspicuous imbalance would not be sufficient to establish a prima facie violation of Title VII.

Once an employer has demonstrated a factual predicate for adopting a voluntary affirmative action plan by uncovering some evidence of a racial or sexual imbalance in its workforce, a plan is bona fide and lawful if it (1) is designed to result in a workforce roughly representative of the area labor market; (2) is temporary and exists only so long as is necessary to achieve its goals; (3) does not result in the selection of unqualified applicants; and (4) does not bar non-minorities or males or otherwise unnecessarily trammel their interests. Neither a finding nor an admission of discrimination is required to justify an affirmative action plan, and actions taken pursuant to a bona fide affirmative action plan should be presumed to be lawful.

Regardless of its decision on the application of the particular plan to the selection decision at issue in this case, the Court should reaffirm that voluntary affirmative action, including the use of goals and timetables, is a lawful means to monitor the utilization of minorities and women in an employer's workforce. Finally, if the Court determines that a finding of a conspicuous imbalance in an employer's workforce is insufficient to support the adoption and implementation of an affirmative action plan, the Court should apply the decision prospectively only.

ARGUMENT

I. VOLUNTARY, FLEXIBLE AFFIRMATIVE ACTION IS CONSISTENT WITH IMPORTANT POLICIES UNDERLYING TITLE VII AND WITH PRIOR DECISIONS OF THIS COURT.

In this case, the Court is called upon to determine the extent to which employers may undertake voluntary affirmative action designed to eliminate conspicuous racial or sexual imbalances which may exist in their workforces. While it is clear that, absent a finding of persistent or egregious discrimination, an employer cannot be *required* to undertake race or sex-based employment preferences, *Local 28 of Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3034, 3054 (1986), it is equally clear that Title VII *permits* employers voluntarily to engage in certain types of affirmative action without violating the Title VII rights of non-minorities or males who may be affected by such actions. As set forth below, it is submitted that a flexible approach to the types of affirmative action that may be undertaken by employers is consistent with previous decisions of this Court and with a number of important policies underlying Title VII.

In *United Steelworkers of America v. Weber*, 443 U.S. 193, 208-09 (1979), this Court held that Title VII does not prohibit private, voluntary race-conscious affirmative action efforts that are designed to eliminate a conspicuous imbalance in an employer's workforce, are temporary in nature and do not unnecessarily trammel the interests of non-minority employees. In *Weber*, the court read the legislative history underlying Title VII to indicate clearly that "management prerogatives . . . be left undisturbed to the greatest extent possible," *id.* at 206, and that "Congress did not intend to limit traditional business freedom," *id.* at 207, so as to prohibit voluntary affirmative action plans. Following this Court's decision in *Weber*, a substantial number of employers, both private

and public, have undertaken various forms of voluntary affirmative action, either through formal plans or by other means.

A flexible approach to the forms of affirmative action permitted by *Weber* and by Title VII serves a number of important purposes that are consistent with the objectives underlying Title VII. First, such voluntary plans or programs are consistent with the notion, long recognized by the courts, that voluntary compliance is the preferred means of eliminating employment discrimination. *See, e.g., Local Number 93 v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986); *W. R. Grace and Company v. Local Union 759*, 461 U.S. 757, 770-71 (1983); *Ford Motor Company v. EEOC*, 458 U.S. 219, 228 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981); *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 44 (1974).

Second, as this Court noted in *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), Title VII was enacted to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Consistent with this policy, voluntary affirmative action plans provide a means for employers to "self examine and self-evaluate their employment practices and to eliminate, so far as possible, the last vestiges of their discriminatory practices." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364 (1977), *quoting Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

A third practical advantage of a flexible approach to the types of affirmative action allowed by *Weber* is that it has enabled employers, if they choose, to respond practically and responsibly to concerns that minorities and women may be underrepresented in their workforces.

This ability to respond voluntarily to such underrepresentation is important because, as this Court recognized in *Teamsters*, 431 U.S. at 339 n. 20, there is an expectation under Title VII that absent explanation, nondiscriminatory employment practices will in time result in a workforce more or less representative of the area from which the employer draws its applicants. In addition, in *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977), the Court held that gross statistical disparities alone may constitute prima facie proof of discrimination.

Whether or not such underrepresentation may have been caused by an employer's own discrimination, it makes employers potential targets of persons protected by Title VII (and other state and federal equal employment statutes and regulations), and of federal and state equal employment enforcement agencies. Thus, employers often may be faced with the practical need to attempt to avoid or lessen the likelihood of such suits through the adoption and implementation of voluntary affirmative action plans.

The dilemma faced by employers in attempting to take affirmative steps to assure equal employment opportunity without unnecessarily interfering with the employment rights and opportunities of non-minority employees has been recognized by a number of courts. This dilemma was addressed by Judge Wisdom in his dissenting opinion in the Fifth Circuit decision in *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1978), where he stated that:

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees

> and potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay (citation omitted).

Justice Blackmun, in his concurring opinion in *Weber, supra*, 443 U.S. at 210, similarly recognized the predicament which employers and unions face:

> If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

See also Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842, 1855 (1986) (O'Connor, J., concurring); *Bratton v. City of Detroit*, 704 F.2d 878, 884 n. 18, *vacated and remanded*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 967-68 (8th Cir.) (*en banc*), *cert. denied*, 454 U.S. 1064 (1981); *Valentine v. Smith*, 654 F.2d 503, 509-10 (8th Cir. 1981).

Thus, a flexible reading of *Weber* has served as a way for employers to avoid "walking a high tightrope without a net beneath them." It has provided a means not only for employers to limit their own liability, but also to effectuate the purposes of Title VII and other federal and state non-discrimination laws, orders and regulations by enabling them to increase the job opportunities available to minorities and women. As set forth below, it is submitted that this Court should maintain, as most of the lower courts have, a flexible standard under *Weber* that permits employers to take meaningful affirmative measures to eliminate conspicuous racial or sexual imbalances in their workforces.

II. AN INTERNAL INVESTIGATION AND CONCLUSION THAT A CONSPICUOUS IMBALANCE EXISTS IS A SUFFICIENT BASIS TO JUSTIFY AN AFFIRMATIVE ACTION PLAN.

The court of appeals in this case determined that in order for an employer to show that its affirmative action plan was remedial, it is not necessary for the employer to demonstrate its own history of discrimination. 770 F.2d at 758. Rather, the court held that "it is sufficient for the employer to show a conspicuous imbalance in its work force." *Id.* As set forth below, it is submitted that the standard thus adopted by the lower court—whether a conspicuous racial or sexual imbalance exists—is consistent with *Weber* and should be affirmed by this Court.

In *Weber*, 443 U.S. at 209, this Court approved a voluntary affirmative action plan which was "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories". It is submitted that the "conspicuous racial [or sexual] imbalance"[2] standard employed in *Weber* is consistent with the purposes, discussed below, underlying Title VII and with the better-reasoned lower court decisions interpreting *Weber* and should be reaffirmed by this Court.

The lower courts have developed standards for evaluating the lawfulness of voluntary affirmative action plans that provide sufficient flexibility to enable employers to take steps to eliminate possible past discrimination in a

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[2] Although *Weber* involved a plan designed to eliminate conspicuous *racial* imbalances in craft jobs, there is no reason to conclude that Congress intended any different standard to apply where an affirmative action plan is implemented to eliminate similar *sexual* imbalances. *See La Riviere v. EEOC*, 682 F.2d 1275, 1279 (9th Cir. 1982) ("Congress did not intend, when it added to Title VII the prohibition of gender-based employment discrimination, to prohibit voluntary affirmative action programs designed to correct long-standing sexual imbalances in the workforce").

manner that is consistent with the principles laid down by the Court in *Weber*. As set forth below, it is submitted that principles derived from these cases provide a framework that this Court should draw upon in deciding the instant case.

For example, in *Setser*, 657 F.2d at 968, the Eighth Circuit established a standard for determining whether an employer had a sufficient basis or factual predicate for adopting an affirmative action plan or program. The court stated that to justify the adoption of such a program, the employer has the burden of producing "some evidence that its affirmative action program was a response to a conspicuous racial imbalance in its work force and is remedial." *Id. See also Warsocki v. City of Omaha*, 726 F.2d 1358, 1360 (8th Cir. 1984).

The court in *Setser*, 657 F.2d at 968, also declared that "[a] showing of a conspicuous racial imbalance by statistics is sufficient, even if the statistics employed would not be sufficient to show a prima facie violation of title VII." Other lower courts likewise have held that a demonstration of a prima facie case is not a prerequisite to the adoption of a voluntary affirmative action plan. *See, e.g., Bushey v. N.Y. St. Civ. Serv. Com'n*, 733 F.2d 220, 226 n.7 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 803 (1985); *Detroit Police Officers' Ass'n. v. Young*, 608 F.2d 671, 689 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981). This also is consistent with Justice Brennan's opinion in *Weber*, 443 U.S. at 208 n.8, which noted that "[t]his is not to suggest that the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII."

While an identified "conspicuous racial imbalance" may, in certain cases, be sufficient to establish a prima

facie violation of Title VII, the necessity for demonstrating a prima facie case before an affirmative action plan may be implemented should not be an express part of any standard adopted by this Court. As the EEOC Affirmative Action Guidelines recognize, "voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation". 29 C.F.R. § 1608.1(c); *see also* 29 C.F.R. § 1608.4(b) ("It is not necessary that the self analysis establish a violation of Title VII).

Finally, and perhaps most importantly, the court in *Setser*, 657 F.2d at 968, observed that an "employer's internal investigation and analysis of its work force which results in a conclusion of a racially imbalanced work force would satisfy the employer's burden". *Id.*[3] The ability to base an affirmative action plan on such a self analysis also is consistent with the suggestions contained in the EEOC Affirmative Action Guidelines. *See* 29 C.F.R. § 1608.4(a).

Thus, it is submitted that the Court should hold expressly that an internal analysis of an employer's work-

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[3] *In Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 562 (7th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3896 (U.S. June 10, 1985), the Seventh Circuit stated that a finding of a statistical disparity between the percentage of minorities employed and the percentage of minorities within the community was not sufficient to justify the adoption of an affirmative action plan. The Seventh Circuit's standard would appear to be seriously at odds with this Court's decision in *Hazelwood*, 433 U.S. at 307-08, where the Court held that gross statistical disparities alone may constitute prima facie proof of discrimination, which if unrebutted would entitle the plaintiff to the entry of judgment in its favor. While evidence other than conspicuous statistical disparities often may be present when an employer is considering whether to adopt an affirmative action plan, a specific requirement for such additional evidence should not be adopted by this Court.

force that reveals a conspicuous imbalance of minorities or women provides a sufficient basis for adopting a voluntary affirmative action plan or program.

III. AN AFFIRMATIVE ACTION PLAN IS LAWFUL IF IT IS DESIGNED TO ACHIEVE A WORKFORCE ROUGHLY REPRESENTATIVE OF THE LABOR MARKET, IS TEMPORARY, DOES NOT RESULT IN HIRING UNQUALIFIED APPLICANTS, AND DOES NOT BAR NON-MINORITIES OR MALES OR OTHERWISE UNNECESSARILY TRAMMEL THEIR INTERESTS.

Once an employer has established a factual predicate for the adoption of a plan by uncovering some evidence of a conspicuous racial or sexual imbalance in its workforce, the plan itself is bona fide and lawful if it is shown that (1) it is designed to result in an employer's workforce that is roughly representative of the area labor market; (2) the plan is temporary and exists only so long as is reasonably necessary to achieve its legitimate goals; (3) the plan does not result in the selection of unqualified applicants; and (4) the plan does not bar non-minorities or males or otherwise unnecessarily or invidiously trammel their interests. As discussed below, these standards provide a reasonable means to judge the lawfulness of voluntary affirmative action plans that is consistent with a goal of increasing the employment opportunities of minorities and women while ensuring that the interests of non-minorities and males are not unnecessarily interfered with.

A. A Plan That Is Designed To Achieve A Workforce Roughly Representative Of The Relevant Labor Market Is Not Unlawful.

The first prong identified above—that a plan should be designed to achieve a workforce roughly representative of the area labor market—is consistent with decisions of this Court and the lower courts and with interpretations by

the federal enforcement agencies. As the Sixth Circuit correctly noted in *Detroit Police Officers' Ass'n v. Young*, 608 F.2d at 696, "a goal which seeks the same racial proportion among employees as in the labor force will ordinarily be reasonable".

This standard also is consistent with the recognition by this Court that "absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired". *Teamsters*, 431 U.S. at 340 n. 20; *see also Weber*, 443 U.S. at 208-09 (approving a plan where preferential selection would end when the percentage of black skilled craft workers approximated the percentage of blacks in the local labor force); *Policy Statement on Affirmative Action*, 41 Fed. Reg. 38,815 (1976) ("The first step in the construction of any affirmative action plan should be an analysis of the employer's workforce to determine whether percentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the relevant job market who possess the basic job-related qualifications"); EEOC *Affirmative Action Guidelines*, 29 C.F.R. § 1608.3 (b) ("The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force").

B. The Plan Must Be Temporary.

This requirement is derived directly from *Weber*, where the Court noted that "the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance". 443 U.S. at 208. The court of appeals in this case correctly read *Weber* "to require that a plan be temporary in the sense that it must end when its goals of parity are met". 748 F.2d at 1312.

C. The Plan Should Not Result In The Selection Of Unqualified Persons

Numerous courts have recognized that it is not unlawful to use race or sex as a factor in selecting from among qualified candidates pursuant to a bona fide affirmative action plan. *See, e.g., Johnson*, 770 F.2d at 759; *Kirkland v. N.Y. State Department of Correctional Services*, 711 F.2d 1117, 1133 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *Setser*, 657 F.2d at 969; *Valentine*, 654 F.2d at 511; *Parker v. Baltimore & O.R. Co.*, 41 FEP Cases 761, 766 (D.D.C. 1986) ("As long as the chosen candidates satisfied the minimum requirements—as these candidates did—it was not discriminatory for B&O to transfer them ahead of plaintiff as part of its affirmative action efforts").

This case comes before the Court in an unusual posture, in that the oral boards which interviewed and rated Johnson and Joyce found Johnson to be the better qualified. More typical, particularly in the private sector, are situations where relative, objective merit determinations are not easily arrived at. Because of the rigidity of the present federal guidelines on showing the validity or job-relatedness of employment tests, *see Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607; Potter, *Employee Selection: Legal And Practical Alternatives To Compliance and Litigation*, 2d Ed. (National Foundation For The Study Of Equal Employment Policy, 1986), merit testing simply is not practicable for many employers in a great many situations.

The practical reality of employee selection where merit testing does not exist is that selections frequently are the product of informed, but often subjective, choices from among a number of qualified persons who possess different skills and characteristics that may be of value to the employer. Thus, unless a minority or woman selected pursuant to a bona fide affirmative action plan is clearly unqualified or demonstrably less qualified, the Court simply

should not put private employers in the position of having their employment decisions second-guessed. *See Weber*, 443 U.S. at 207 (Title VII not intended to "diminish traditional management prerogatives" or "to limit traditional business freedom"). *Cf. California Brewers Association v. Bryant*, 444 U.S. 598, 608 (1980).

D. The Plan Should Not Bar Non-Minorities Or Males Or Otherwise Unnecessarily Trammel Their Interests.

The lower court in this case correctly noted that where there is only a single selection in issue, it cannot be said that the selection of a minority or woman pursuant to an affirmative action plan "serves as a bar or unnecessarily trammels the interests of other employees". 770 F.2d at 759; *see also Talbert v. City of Richmond*, 648 F.2d 925, 929 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982). Any other rule would have the effect of subjecting each decision made pursuant to an affirmative action plan to a potential "reverse discrimination" claim. Such a result could have a significant effect on the willingness of employers to undertake voluntary affirmative action programs.

E. Actions Taken Pursuant To A Bona Fide Affirmative Action Plan Should Be Presumed To Be Lawful.

Once an employer has identified a "conspicuous [racial or sexual] imbalance" in its workforce and has adopted a bona fide affirmative action plan or program consistent with the guidelines set forth above, decisions made pursuant to such a plan should be presumed to be lawful. In order to avoid having judgment entered against him or her as a matter of law, a plaintiff in a "reverse discrimination" case should be required to show that:

(1) some reason other than a remedial reason motivated the employer when implementing the plan or

(2) the plan adopted unreasonably exceeds its remedial purpose. *Setser*, 657 F.2d at 969.[4]

Absent such a showing, an employer faced with a challenge to the operation of a voluntary, bona fide affirmative action plan should be entitled to judgment as a matter of law.

F. Neither A Finding Nor An Admission Of Discrimination Is Required To Justify An Affirmative Action Plan.

The lower court in this case correctly noted that a judicial determination of discrimination is not required before an employer, either public or private, can adopt an affirmative action plan. *Johnson*, 770 F.2d at 758. *See also Bushey*, 733 F.2d at 228 n.11 ("[A] judicial determination of racial discrimination is not a prerequisite to an employer adopting voluntary, race-conscious remedies to comply with Title VII"). A requirement for a judicial finding of discrimination as a predicate to the approval of a bona fide affirmative action program would place an additional unnecessary strain on our already overburdened judicial system and, as noted below, such a finding could potentially be used against the employer in subsequent actions.

Neither should an employer be required to admit, either explicitly or implicitly, that it has engaged in prior discrimination. Any requirement that an employer admit a violation of the law before it could adopt a voluntary affirmative action plan or program would undermine significantly the ability and willingness of employers to undertake such programs. *See Wygant*, 106 S. Ct. at 1855

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[4] For example, a plaintiff in a reverse discrimination case could attempt to show that "the defendant is that unusual employer who discriminates against the majority", *Parker v. Baltimore & O.R.* 652 F.2d 1012, 1017 (D.C. Cir. 1981), or that the affirmative action program was designed to maintain a particular racial or sexual balance rather than merely to eliminate a conspicuous imbalance.

(O'Connor, J., concurring). The risk that such admissions would be used by other employees or groups of employees in future lawsuits as evidence of the employer's unlawful discrimination would deter many employers from undertaking voluntary affirmative action. Thus, it is submitted that where the requisite showing of a conspicuous imbalance in the workforce has been made, a sufficient predicate for affirmative action exists without the need to go further and require a finding or admission that the imbalance resulted from discrimination.[5]

IV. EVEN IF THE COURT DETERMINES THAT JOHNSON WAS UNLAWFULLY DISCRIMINATED AGAINST, IT SHOULD CLEARLY REAFFIRM THAT LEGITIMATE, VOLUNTARY AFFIRMATIVE ACTION PLANS ARE PERMITTED UNDER TITLE VII.

As noted above, in this case Johnson contends that he was discriminated against when he was denied a promotion pursuant to the *application* of a voluntary affirmative action plan. Pursuant to the criteria suggested above, it would appear that the affirmative action *plan itself* would not be subject to challenge as violative of Title VII. Regardless of its holding on the lawfulness of the application of the plan in this particular instance, the Court should reaffirm that voluntary affirmative action plans themselves are a lawful means to monitor the utilization of minority, female and handicapped individuals in an employer's workforce.

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[5] This is consistent with EEOC's *Affirmative Action Guidelines*, 29 C.F.R. § 1608. 4(b), which provide that:

> It is not necessary that the [employer's] self analysis establish a violation of Title VII. This reasonable basis [for concluding that affirmative action is needed] exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exists arguable defenses to a Title VII action.

Where individuals challenge the application of an affirmative action plan to a particular selection decision, such a challenge should not call into question the lawfulness of the affirmative action plan itself. Rather, this Court should clearly note that the affirmative action *plan itself* was not unlawful, and that the provisions contained in the plan for recruitment, selection, upward mobility, training and the monitoring of the utilization of minority, female and handicapped individuals can stand regardless of the outcome of Johnson's individual challenge. This is particularly true where, as here, the plan contained no fixed quotas or other rigid requirements that a particular percentage of selections must be from any particular race or sex.

The Court also should clearly indicate that private employers are free under Title VII to adopt race or sex-conscious *goals* which serve as a means of measuring good-faith efforts to increase the employment opportunities of minorities and women. A recognition that flexible goals are permissible under Title VII is consistent with long-standing agency interpretations and with decisions of this Court and the lower courts.

Beginning in 1969, the agencies charged with the enforcement of equal employment opportunity laws, orders and regulations have distinguished flexible "goals" from rigid quotas. *See, e.g.*, 42 Op. Atty. Gen. 405 (1969); *Memorandum—Permissible Goals and Timetables In State and Local Government Employment Practices*, 2 Empl. Prac. Guide (CCH) 3775 (March 23, 1973), issued by EEOC, the Departments of Justice and Labor and the Office of Federal Contract Compliance ("All of the agencies recognize that goals and timetables are appropriate as a device to help measure progress in remedying discrimination"; "All agencies recognize the basic distinctions between permissible goals on the one hand and impermissible quotas on the other"; "A goal . . . is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified

applicants available in the relevant job market". *Id.* at 2096); *Policy Statement on Affirmative Action*, 41 Fed. Reg. 38,815 (1976).

In addition, Executive Order 11246 and its supporting affirmative action regulations issued by OFCCP require federal contractors to undertake a written workforce analysis and develop a written affirmative action compliance program for each of their establishments.[6] If a contractor's "utilization" of available minorities or women is numerically deficient, it must develop "goals and timetables" to overcome the deficiency in any particular job group.[7] *See also OFCCP v. Priester Construction Co.*, No. 78-OFCCP-11 (Feb. 22, 1983), summarized in OFCCP Order No. 970 a3, reprinted in 2 BNA AACM D: 9121 (1983) (Distinguishing "goals" from rigid "quotas").

Flexible goals properly have been viewed as "benchmarks" against which employers, the federal enforcement agencies and the courts can measure an employer's efforts to ensure that it is affording equal employment opportunities to all, particularly those groups which may have been affected by any past practices that operated to interfere with their employment opportunities. *See Local 28*, 106 S. Ct. at 3051 (Opinion of Justice Brennan) (Goal approved which serves "as a benchmark against which the court could gauge petitioner's efforts to remedy past discrimination"); 106 S. Ct. at 3060 (Concurring and dissenting opinion of Justice O'Connor) ["A] racial hiring or membership goal must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination, rather than a rigid numerical requirement that must unconditionally be met on pain of sanction.").[8]

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[6] Revised Order No. 4, 41 C.F.R. Part 60-2.

[7] 41 C.F.R. §§ 60-2.10, 60-2.12.

[8] At the request of both EEOC and the Department of Justice, a number of lower courts have ordered relief that included the use

Thus, the Court should clearly acknowledge that flexible affirmative action plans which are designed as a means to gauge an employer's efforts to ensure equal employment opportunity and to increase the number of minorities and women in its workforce are permissible under Title VII.

V. IF THE COURT DETERMINES THAT FINDINGS OF A CONSPICUOUS IMBALANCE ARE INSUFFICIENT TO SUPPORT THE ADOPTION AND IMPLEMENTATION OF AN AFFIRMATIVE ACTION PLAN, THE COURT SHOULD APPLY THE DECISION PROSPECTIVELY ONLY.

Although it upheld the plan before it in *Weber*, this Court expressly noted that "[w]e need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans." 443 U.S. at 208. In its recent decision in *Local Number 93*, 106 S.Ct. at 3073 n.8, the Court expressly left unanswered a number of important questions regarding the proper scope of voluntary affirmative action, including "what showing the employer would be required to make concerning possible prior discrimination on its part against minorities in order to defeat a challenge by nonminority employees based on § 703." *See also* 106 S.Ct. at 3080 (O'Connor, J., concurring). The Court thus has given no clear signal that employers should not rely on the body of lower court decisions (discussed *supra*) upholding voluntary affirmative action plans predicated on conspicuous workforce imbalances.

Meanwhile, as noted above, the federal enforcement agencies and the lower courts have actively encouraged

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of goals and timetables for employing minorities and women. *See, e.g., United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

and in many instances insisted upon the use of goals and timetables as a means of measuring employers' progress in increasing the number of minorities and women in the workforce. Against this background, and in part because of these government pressures, countless employers throughout the nation have adopted affirmative action plans designed to alleviate conspicuous workforce imbalances.

Under these circumstances, should the Court now determine that a finding of a conspicuous racial or sexual imbalance is *not* a sufficient basis for adopting and implementing a voluntary affirmative action plan, it would be inappropriate to impose retroactive liability on employers who have adopted such plans. Rather, any relief to "reverse discrimination" claimants affected by the operation of such plans should be prospective only.

In *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 421 (1975), this Court held that backpay may be denied when the denial would not frustrate the central purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The Court in *Albemarle* also held that backpay was not to be awarded automatically in every case. *Id.* at 424. In *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), this Court, in denying a retroactive backpay award in a pension contribution case, relied upon the fact that "the administrative agencies had conflicting views," *id.* at 720 and n.37; that the City reasonably could have thought it illegal to make male employees shoulder more than their "actuarial share" of the pension burden, *id.*, and that the legal theory upheld "represent[ed] a marked departure from past practice." *Id.* at 722; *see also Arizona Governing Committee, Etc. v. Norris*, 463 U.S. 1073, 1094-95, 1109-11 (1983). These reasons fully support the denial of backpay to "reverse

discriminatees" where employers in good faith have adopted affirmative action plans which at the time they were adopted were supportable by existing case law or government enforcement agency policy or which otherwise were designed to eliminate the underrepresentation of protected groups in their workforces.[9]

A decision by this Court allowing imposition of retrospective monetary liability against employers who merely sought, in good faith, to carry out voluntary affirmative action efforts consistent with federal laws and policies would clearly be unjust. Thus, if the Court determines that a finding of a conspicuous imbalance is insufficient to establish a basis for voluntary affirmative action, the Court should clearly state that relief to "reverse discriminatees" should be prospective only. Such a rule will give well-intentioned employers who have relied on agency interpretations and court rulings an opportunity to modify their plans to comply with the Court's decision before they are subject to liability.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should hold that a conspicuous racial or sexual imbalance provides a sufficient basis for adopting and implementing a voluntary affirmative action plan. In addition, the Court should hold that an affirmative action plan is lawful if it is designed to achieve a workforce roughly representative of the area labor market, is

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[9] The denial of backpay to individuals alleged to be adversely affected by the operation of an affirmative action plan is consistent with the EEOC *Affirmative Action Guidelines*, 29 C.F.R. § 1608.1, 1608.2. The Guidelines state that an employer who adopts and implements an affirmative action plan in accordance with the Guidelines can invoke the protections of 42 U.S.C. § 2000e-12(b)(1) of Title VII, which prohibits liability against an employer whose actions were taken "in good faith, in conformity with, and in reliance upon a written interpretation or opinion of the Commission."

temporary, does not result in selection of unqualified persons and does not bar non-minorities or males or otherwise unnecessarily trammel their interests.

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